

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAFAEL MORENO</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,034
<b>NATIONAL BEEF PACKING CO.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LUMBERMEN'S UNDERWRITING ALLIANCE</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent appeals from an award entered by Administrative Law Judge Kenneth S. Johnson on July 23, 1997. The Appeals Board heard oral argument on January 14, 1998.

**APPEARANCES**

Claimant appeared by his attorney, Mike Allen of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney, Shirla R. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record identified in the Award. The Appeals Board adopts the stipulations made at the outset of the hearing of April 25, 1996.

**ISSUES**

The sole issue on appeal is the extent, if any, of liability of the Kansas Workers Compensation Fund. The Administrative Law Judge found that the Fund has no liability. Respondent contends that the Workers Compensation Fund should be liable for that portion of the benefits attributable to claimant's right carpal tunnel syndrome and tenosynovitis of the long extensors of the right hand.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed.

Claimant was injured on May 7, 1993, when a hind quarter of beef fell on his right upper extremity. Respondent settled the claim for those injuries at the hearing on September 12, 1996, and reserved the right to proceed against the Kansas Workers Compensation Fund. To impose liability on the Fund, respondent must show that it had knowledge of a preexisting impairment which constituted a handicap. Respondent must also show that the preexisting impairment caused or contributed to the disability resulting from a second accident. K.S.A.1992 Supp. 44-567.

Claimant suffered a previous repetitive type injury to his left wrist, arm, elbow, and shoulder in January of 1992. He filed a claim for workers compensation benefits and that claim was settled at a hearing held in October of 1993. Although respondent acknowledges that claimant suffered a traumatic injury on May 7, 1993, and concedes that certain of the resulting injuries were unrelated to any preexisting impairment, respondent, nevertheless, contends that a portion of the claimant's right-side injuries are attributable to overuse of the right after the previous injury on the left.

After reviewing the record, the Appeals Board concludes that respondent has failed to meet its burden of proving that all or any part of the injuries compensated in the settlement of September 12, 1996, were caused or contributed by the previous left-side injuries. Respondent's arguments rest primarily on the testimony of Aly M. Mohsen, M.D. Dr. Mohsen does testify that the right side carpal tunnel condition would not have occurred but for claimant's overuse of the right arm and right hand to compensate for injuries to the left upper extremity.

However, after reviewing Dr. Mohsen's testimony, the Board concludes that the testimony does not satisfy respondent's burden. First, Dr. Mohsen testifies that claimant's right carpal tunnel syndrome occurred after claimant's right shoulder injury of May 6, 1993. Dr. Mohsen's records indicate that after that injury, claimant overused the left upper extremity to compensate for the injuries on the right. It is the injuries to the right which are at issue here. When Dr. Mohsen was asked questions which pointed out this apparent inconsistency, he testified that claimant would have overused the right side after the injuries on the left in 1992. He further testified it would not matter whether the injury on the right appeared before or after the traumatic injury on the right side on May 6, 1993. The Board

finds this explanation unconvincing in light of claimant's work history. The record shows that after claimant's injury to his left upper extremity in January 1992, claimant was then off work for approximately 11 months between the left upper extremity injury and the right upper extremity injury. The other months were spent performing a light duty position. It does not, therefore, appear more probable than not that claimant's right-sided carpal tunnel syndrome resulted from overuse of the right side during that 14-month period.

For the above and foregoing reasons, the Appeals Board concludes that the Order by the Administrative Law Judge denying respondent's request to impose liability on the Kansas Workers Compensation Fund should be denied.

**AWARD**

**WHEREFORE**, the Appeals Board finds that the award entered by Administrative Law Judge Kenneth S. Johnson, dated July 23, 1997, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mike Allen, Liberal, KS  
Shirla R. McQueen, Liberal, KS  
Wendel W. Wurst, Garden City, KS  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director